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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 551

A. RAY SEGAL, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 26-40) is reported at 246 F. 2d 814. The memorandum opinion of the District Court (Pet. App. 21-25) is reported at 147 F. Supp. 506.

JURISDICTION

The judgment of the Court of Appeals was entered on August 6, 1957 (Pet. App. 41). A petition for rehearing was denied on September 13, 1957 (Pet. App. 42). The petition for a writ of certiorari was filed on October 14, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in allowing evidence of an admission of the crime charged when that evidence incidentally indicated the commission of a similar offense and the trial judge specifically cautioned the jury in his final charge that they were to concern themselves only with whether petitioner was guilty of the crime charged in the indictment.

2. Whether the trial court erred in permitting government counsel to cross-examine certain of petitioner's character witnesses as to whether they had heard specific rumors of past misconduct by petitioner.

STATEMENT

Petitioner was found guilty in the United States District Court for the District of Minnesota of subornation of perjury in violation of 18 U.S.C. 1622 (R. 5-12). He was sentenced to imprisonment for eighteen months and a fine of $2,000 (R. 167-168).[1] The Court of Appeals unanimously affirmed (Pet. App. 41).

The indictment charged petitioner, an attorney, with suborning Mary K. Johnson to commit perjury at the Mann Act trial of Donald Nelson, whom petitioner represented. Although the indictment contained only one count and charged but one offense, it contained nine separate paragraphs each dealing with a separate subject matter of perjury at the Nelson trial. The court submitted four to the jury:

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[1] A prior verdict had been set aside and a new trial granted (R. 3).

(1) that Mary Johnson did not engage in prostitution in Chicago, Illinois, between November 11, 1952, and December 31, 1952, but worked in Spiegel's Department Store there; (2) that she did not use drugs as an addict in Chicago between November 11, 1952, and December 31, 1952; (3) that she did not know whether Nelson had driven her across a state line in his automobile; and (4) that she did not see Robert Bannarn, a co-conspirator in the Nelson case, in Chicago on or about November 11, 1952.

At the trial of the instant case, Mary Johnson testified that her testimony on these matters at the Nelson trial was false and that petitioner had induced her to give such false testimony (R. 21-33; S.R. 1-15). Her testimony as to the falsity of the first item set forth above was corroborated by officers of the Chicago police department and others (R. 44-53, 64-65); as to the second, by the police (S.R. 18-19) and by two former employees of Spiegel's (S. R. 18-20, 53); as to the third, by Robert Bannarn (R. 64) and one Rebecca Aron, who travelled from Minnesota with Nelson, Bannarn and Johnson (R. 67-68, 74-75); and as to the fourth, by Bannarn (R. 64) and a Mrs. Bowde, who owned the apartment building where Bannarn and Johnson lived (R. 43-44). The Court of Appeals for the Eighth Circuit determined there was ample evidence to sustain the conviction (Pet. App. 29) and petitioner does not urge before this Court that the evidence was insufficient.

To corroborate Mary Johnson's positive testimony that petitioner induced her to testify falsely at the Nelson trial, Shelly Warren testified that petitioner

admitted to her that he had induced Mary Johnson to perjure herself in the Nelson case. Miss Warren had been a potential government witness in the Mann Act prosecution of Barrett, whom petitioner represented, and had also been represented by petitioner for a short time (R. 54-57).

She testified at the trial below that she and Barrett lived together and travelled from state to state while she practiced prostitution, and that petitioner knew she was a prostitute (R. 54, 57). In response to a question as to what petitioner told her to say if she had to testify in the Barrett case, she replied, "Well, I was only told not to answer any questions that the F.B.I. asked me" (R. 55). She subsequently corrected this and said that petitioner had given her that instruction when he spoke to her just prior to Barrett's arrest, and that petitioner had spoken to her again after Barrett's arrest when she was subpoenaed to testify as a government witness in the case (R. 56). The following colloquy then took place (R. 56-57):

> Q. And what did Mr. Segal tell you in regard to testifying pursuant to that subpoena.
>
> * * * *
>
> The Witness: He told me that I was never to admit to the Grand Jury that I had ever had intercourse with Godfrey Barrett, I had ever given him any money, I had ever traveled for the purposes of prostitution, that I had only traveled on a share-the-expense plan and that all of us shared expenses. I had received money from my mother in ordinary mail, that I had worked at various places under aliases which I

couldn't remember, because the places I worked I hadn't stayed long enough, only until I was asked for a Social Security card, that if I did that, I would never have to go to trial because I was the main witness for Barrett and that if I did that there wouldn't be any trial. And I asked him if he was going to go with me to Springfield, because I was subpoened [sic] to Springfield and he said it would never reach there, and *he told me he defended a girl named Mary Johnson successfully in a similar case and she had listened to him and the case had been beaten, and said that he told her to say that she worked at Spiegel's Mail Order House for two months, and that she testified in that manner and, whatever the case was, was never—they beat the case anyway.* [Emphasis added.]

In his charge, the judge cautioned the jury that the sole issue for their determination was whether petitioner was guilty of subornation of perjury as charged in the indictment and that they should not speculate on whether he committed another crime (R. 143).

Petitioner produced a number of character witnesses, including some local attorneys. The first lawyer-witness testified on cross-examination that he had never heard petitioner's reputation questioned among the many lawyers with whom he associated. Government counsel then approached the bench and stated to the judge that he intended to ask the witness if he had heard that, in a 1945 case in Minneapolis, petitioner had presented to the court, on behalf of a client, an altered receipt for the delivery of registered mail which had been in petitioner's

possession from the time it was surrendered by the Post Office until presented to the court, and that the judge had requested opposing counsel to report the matter to the Ethics Committee of the local bar (R. 118). Counsel for the government showed the court portions of the transcript from the case in question (R. 119). He also submitted to the court a copy of the letter written to the Ethics Committee by opposing counsel (R. 119).[2]

The court, over objection, decided to permit the question but gave the following cautionary instruction before the question was asked (R. 120):

> The Court: I instruct the jury that what is happening now is this: The defendant has called character witnesses, and the basis for the evidence given by those character witnesses is the reputation of the defendant in the community, and since the defendant tenders the issue of his reputation the prosecution may ask the witness if he has heard of various incidents in his career. I say to you that regardless of his answer you are not to assume that the incidents asked about actually took place. All that is happening

[2] Both the transcript and the letter were made a part of the supplemental record on appeal since both had been shown to the judge. The letter stated that it was written at the instance of the judge, that the date had been altered in favor of petitioner's client, that "it was obvious" the return receipt had not been in anyone's hands other than Mr. Segal's from the time it was delivered to him by the post office until it was produced by him in court, that Mr. Segal apparently "has perjured himself as well as committing perjury", and that both he, counsel, and the judge would be willing to appear before the Committee in presenting evidence about the above matters (S. R. 53-55).

is that this witness' standard of opinion of the reputation of the defendant is being tested.

The question followed (R. 120-121):

> Q. Mr. Iverson, have you heard anything about the proceedings in the case of Max Herman against Joseph St. Dennis, which was in Municipal Court, City of Minneapolis, in October 1945, and have you heard whether in that trial the defendant, Mr. A. Ray Segal, presented to the Court and offered in evidence a card registered mail postal receipt in which it appeared that the date on the receipt had been rewritten from the time it had first been written, as to date, and that thereafter the postal authorities here in the City of Minneapolis testified that the date was then apparently the date, the rewritten date on the card as offered in evidence, was an earlier date than the records of the Minneapolis Post Office Department, as testified to in that case showed. That thereafter Mr. Segal representing the plaintiff, whose case depended on the receipt, the claim of having been received on the date shown in the altered date, Mr. Segal then moved for dismissal of the case. Have you heard about that?

Certain other of the lawer-witnesses were asked the same question.

In its general charge, the court amplified the instruction above, pointing out, *inter alia* (R. 149):

> * * * There is no proof in this case and none could be produced legally before you within the rules of evidence as to the actual happening of those incidents about which the prosecution was permitted to inquire. Accordingly, you are not to hold any of those incidents so inquired about

against this defendant nor are you to assume or consider that they may have occurred. * * *

ARGUMENT

1. Petitioner contends that the trial court erred in admitting the testimony of Shelly Warren (*supra*, pp. 5) which indicated the commission of a separate similar offense (Pet. 17-19). Petitioner recognizes that what he told Miss Warren about Mary Johnson's testimony was admissible (R. 129; Pet. 18), but he objects to the admission of the evidence disclosing an attempt to suborn Shelly Warren to perjure herself in the Mann Act trial of Godfrey Barrett (R. 129; Pet. 18-19).

Miss Warren's testimony, however, was not divisible. To make petitioner's comments about Mary Johnson intelligible as an admission, it was necessary to show the context and the attendant circumstances. If Shelly Warren had merely testified that "Mr. Segal told me a girl named Mary Johnson had listened to him in a similar [or another] case when he told her to say she worked at Spiegel's for two months and the case was beaten," the evidence would have lacked both reliability and foundation. It was incumbent upon the prosecution to show that the witness had occasion to speak to petitioner under circumstances that would prompt him to make such a statement.[3] The full significance of the statement

[3] Similarly, the testimony of Lovie Barrett and the United States Marshal to which petitioner objects (Pet. 17-18) was competent. Lovie Barrett merely established that petitioner had been retained in the Barrett case (R. 61-62), and the

as to Mary Johnson would not have been apparent if torn from the context of petitioner's attempt to persuade Shelly Warren to testify falsely in the Barrett case. Facts which tend to explain or unfold a situation are admissible as establishing the relevancy of evidence. *Bedell* v. *United States*, 78 F. 2d 358, 364 (C.A. 8). And relevant evidence is not rendered inadmissible because it incidentally tends to prove the commission of another crime. *Moore* v. *United States*, 150 U.S. 57; *Smith* v. *United States*, 236 F. 2d 260, 267 (C.A. 8), certiorari denied, 352 U.S. 909; *Bram* v. *United States*, 226 F. 2d 858, 863 (C.A. 8); *Vause* v. *United States*, 53 F. 2d 346, 355 (C.A. 2).

Moreover, the evidence was independently admissible on the issue of intent. The conversation between petitioner and Shelly Warren, which took place between the time of the crime charged in the instant indictment and petitioner's trial, was closely connected in time with the offense here and involved precisely the same type of conduct. See *Nye & Nissen* v. *United States*, 336 U.S. 613, 618; *United States* v. *Herskovitz*, 209 F. 2d 881, 885 (C.A. 2).

Marshal testified as to the date Barrett was apprehended (R. 62). Their testimony corroborated that of Shelly Warren and was not itself prejudicial.

Petitioner puts misplaced reliance on *Boyd* v. *United States*, 142 U.S. 450, and cases following the principle set forth therein. In *Boyd*, evidence was introduced at a murder trial connecting defendants with five robberies committed before the murder. The robberies were crimes completely unrelated to the murder for which the defendants were being tried. In this case, testimony relating to an admission inci-

2. Petitioner asserts that it was prejudicial error to permit the character-witness lawyers to be asked if they had heard of the altered postal receipt (Pet. 11-17; R. 120-121; *supra*, p. 7).

Before asking the question, government counsel satisfied the court that figures on the receipt had been forged and that petitioner had been suspected of forging them. He submitted to the court a transcript from the *St. Dennis* trial and a copy of a letter from opposing counsel in that case to the Chairman of the Ethics Committee of the County Bar Association, stating that it was written at the instigation of the trial judge and requesting an investigation into the matter (R. 119; S.R. 46-55; *supra*, p. 6). Before permitting this cross-examination, the court carefully instructed the jury that the witness' standard of opinion of the reputation of petitioner was being tested and that they were "not to assume that the incidents asked about actually took place" (*supra*, p. 6). These instructions were amplified in the general charge (R. 149; *supra*, pp. 7-8). The matter was properly handled under *Michelson* v. *United States*, 335 U.S. 469. See, also, *Spalitto* v. *United States*, 39 F. 2d 782, 787 (C.A. 8); *Kasper* v. *United States*, 225 F. 2d 275 (C.A. 9); *Smith* v. *United States*, 173 F. 2d 181, 185 (C.A. 9); *Mannix* v. *United States*, 140 F. 2d 250, 252 (C.A. 4).

The *Michelson* case involved a charge of bribing a federal officer. The defendant admitted the payment

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denial indicated the commission of a *similar* offense, and it bore directly on the issue of intent.

but claimed that it was induced by the officer. He also offered testimony as to his good reputation. On cross-examination, the prosecutor was permitted to ask the character witnesses whether they had heard that the defendant had been arrested 27 years previously for receiving stolen goods. This Court held that there was no prejudicial error and set up the following standards for such cross-examination: (1) the trial court must satisfy itself as to the existence of an occurrence which, if reported and rumored, would bear upon reputation; (2) the question must be as to report, that is, in the form of "have you heard" rather than "do you know"; and (3) appropriate instruction of the jury as to use of the evidence is desirable if not necessary. All of those requirements were met in the present case.

Petitioner contends that there must be no doubt as to the *fact* of the misconduct and implies that the question, to be proper, must ask whether the witness has heard rumors of an uncontroverted fact of misconduct (Pet. 11-17). However, as pointed out several times by the trial court, it is the witness' standard of opinion that is being tested, *i.e.*, whether he had heard *rumors* about a specific act of misconduct that would affect petitioner's reputation, regardless of the truth of the rumors.[5] This Court said in

[5] The court also pointed out that there was no proof in the case, and that none could be produced legally, as to the actual happening of the incident (*supra*, p. 7). The letter and transcript were submitted to the court to enable the judge to determine whether the question could properly be asked.

Michelson, 335 U.S. 469, 479:

> * * * The prosecution may pursue the inquiry with contradictory witnesses to show that damaging rumors, *whether or not well grounded*, were afloat—for *it is not the man that he is, but the name that he has which is put in issue.* * * * It may test the sufficiency of his knowledge by asking what stories were circulating concerning events, such as one's arrest, about which people normally comment and speculate. [Emphasis added.]

In this case, specific facts were presented to the court showing that petitioner, an attorney, had been suspected of forging numbers on a postal receipt. Reports of that kind are very apt to circulate among members of a local bar. Certainly, then, it was proper for the government to test as it did the standard of opinion of those lawyers who were called by petitioner as character witnesses.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1957.